UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

November 21, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding OCAHO Case No. 96C00031
ROBERTO C. DAVILA, Respondent.	)	

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION TO COMPEL ANSWERS TO DEPOSITION QUESTIONS

I. *Background*

On August 22, 1996, the Complainant conducted a deposition of the Respondent, Roberto Davila, as part of prehearing discovery in this matter. During the deposition, the Respondent refused to answer nineteen questions on the grounds of his Fifth Amendment privilege against self-incrimination. Subsequently, on September 13, 1996, the Complainant filed a Motion to Compel deposition testimony, which was timely answered by the Respondent. The Respondent noted that there had been no certification in Complainant's motion that it in good faith attempted to confer with the Respondent to resolve the discovery dispute. Thus, on October 4, 1996, I ordered the parties to attempt to confer to discuss the disputed questions. Finally, on November 4, the Complainant filed a Memorandum of Conference detailing that while a meeting had been attempted, it had never come to fruition. Thus, the Complainant's Motion to Compel is now ripe for adjudication.

II. *Legal Analysis*

While the Fifth Amendment's protection against self-incrimination only protects against criminal liability, the Fifth Amendment privilege may be asserted in any proceeding, civil or criminal, administrative, investigatory, or adjudicatory, when the witness reasonably believes that the disclosures could be used in a criminal prosecution or could lead to other evidence that might be so used. *See Maness v. Meyers*, 419 U.S. 449, 464 (1975); *Kastigar v. United States*, 406 U.S. 441, 444–445 (1972); *United States v. Maria Elizondo Garza, d/b/a Garza Farm Labor*, 4 OCAHO 644, at 8 (1994). The burden is on the witness claiming the privilege against self-incrimination to show that the privilege is applicable and properly invoked. *See United States v. Alberto Noriega-Perez*, 5 OCAHO 777, at 4 (1995) (finding the cursory manner of witness' invocation of Fifth Amendment privilege insufficient). *Accord, North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987); *Rogers v. Webster*, 776 F.2d 607, 611 (6th Cir. 1985); *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983).

In *Noriega*, Judge McGuire noted that the procedural rules applicable to proceedings codified at 28 C.F.R. Part 68 were not instructive regarding the manner in which privilege claims should be treated. *Noriega*, 5 OCAHO 777 at 3. However, 28 C.F.R. §68.1 provides that the Rules of Civil Procedure for United States District Courts may be used as general guidelines in situations not covered under Part 68. Thus, the relevant Federal Rule of Civil Procedure is Rule 26(b)(5). The applicable part of that rule states that:

> when a party withholds information . . . by claiming that it is privileged . . . the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privileged or the protection.

Fed. R. Civ. P. 26(b)(5). *See also Noriega*, 5 OCAHO 777 at 3 (looking to the relevant Federal Rule of Civil Procedure in situations not covered under Part 68).

The protections of the Fifth Amendment may only be invoked in response to questions that present a "real and appreciable danger of self-incrimination." *United States v. Maria Elizondo Garza, d/b/a Garza Farm Labor*, 4 OCAHO 644, at 8 (1994) (internal citations omitted). The privilege is properly invoked where the witness has "reasonable cause" to apprehend danger from an unprotected an-

swer. *Hoffman v. United States*, 341 U.S. 479, 486–87 (1950) (noting that a court must "construe the privilege against self-incrimination broadly and must sustain it if it is 'evident from the implications of the question, in the setting in which it is asked, that a responsive answer . . . might be dangerous *because injurious disclosure could result*'") (emphasis supplied). *See also Steinbrecher v. Commissioner*, 712 F.2d 195, 198 (5th Cir. 1983) (finding that the privilege must be sustained when it is "evident from the implications of the question, in the setting in which it is asked that a responsive answer [might lead to injurious results]").

The Supreme Court held that the Fifth Amendment's privilege against self-incrimination protects against evidence that would provide "a link in the chain of evidence needed to prosecute." *Malloy v. Hogan*, 378 U.S. 1, 11 (1964). Lower courts have evaluated the question of privilege in a like manner, with one court noting that there must be "credible reasons why revealing such information presents more than a frivolous fear of incrimination," *SEC v. Parkersburg Wireless Ltd. Liab. Co.*, 156 F.R.D. 529, 537 (D.D.C. 1994) (internal citations omitted), and another holding that a party asserting such a privilege must demonstrate a "nexus" between the information sought and the potential for criminal liability. *Baker v. Limber*, 647 F.2d 912, 916 (9th Cir. 1981). Regardless, the determination is to be made by a court on a case-by-case basis. *In re Grand Jury Proceedings*, 13 F.3d 1293, 1295 (9th Cir. 1994) (noting that the prospect of incrimination is "generally determined from the setting and peculiarities of each case") (internal citations omitted).

Furthermore, the Fifth Circuit Court of Appeals has held that a court should follow a two part test, in which the court

> must ordinarily make two inquiries to determine whether a witness is entitled to assert the privilege and refuse to respond to questioning. First, the court must determine whether answers to the questions might tend to reveal that the witness has engaged in criminal activities. If the answers could not be incriminatory, the witness must answer. If answering the questions might incriminate the witness, the court must next ask whether there is a risk, even a remote risk, that the witness will be prosecuted for the criminal activities that his testimony might touch on.

In re Corrugated Container Anti-trust Litigation, 620 F.2d 1086, 1091 (5th Cir. 1980) (citing *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087, n.5 (5th Cir. 1979) (internal citations omitted)).

Respondent's counsel did not address the basis for the invocation of the privilege with respect to the specific questions in the deposition. Indeed, during the deposition, when Complainant correctly noted that the Respondent should detail with as much specificity as possible the reasons behind Mr. Davila's invocation of the Fifth Amendment, Respondent's counsel steadfastly refused. Dep. of Roberto Davila at 18–19. Respondent's response to Complainant's Motion to Compel was only marginally improved. The response was two and a half pages long and did not refer to either a specific question or even the type of questions asked.

Despite the inadequacy of the response and the lack of input from the Respondent, given the importance of the Constitutional claim raised, I have carefully considered each of the certified questions in the motion, and have attempted to determine whether there is a "real and appreciable danger of self-incrimination" and whether the witness has "reasonable cause" to apprehend danger from an unprotected answer. Even in spite of the numerous protections afforded a party invoking the Fifth Amendment, a witness is not justified in refusing to answer questions based on the Fifth Amendment privilege against self-incrimination if the applicable statute of limitation has run, thus eliminating the possibility that the witness's answers will lead to or assist in his prosecution. *United States v. Goodman*, 289 F.2d 256, 259 (4th Cir. 1961) (citing *Brown v. Walker*, 161 U.S. 591 (1896) and *Hale v. Henkel*, 201 U.S. 43 (1906)).

The party objecting to the privilege's invocation has the burden of proof" not only to show that the statutory period of limitation has expired, but also that no prosecution has been begun within that period, or, if begun, that it has been discontinued in such manner as to protect the witness from further prosecution." *Goodman*, at 262–63.

Mr. Davila could face criminal liability under the various document fraud provisions, such as 18 U.S.C. §1001 (providing for fines and/or imprisonment for anyone who, "in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry"); and 18 U.S.C. §911 (providing for fines and/or imprisonment for anyone who "falsely and willfully represents himself to be a citizen of the United States").

The statute of limitation for prosecuting a non-capital offense is five years after the offense is committed, unless the law provides otherwise. 18 U.S.C. §3282 (1994). As Congress has not designated a different statute of limitation with respect to the above-discussed sections, the general five-year limitations period for non-capital offenses applies because neither is designated a capital offense.

Complainant contends that Respondent can not incriminate himself regarding questions about his employment at National Cash Register Company in 1988, Jochin Chrome Lab Company in 1989, and GMA Research Company in 1990, because the five year statute of limitation already has expired. Comp. Resp. to Resp. Answer at 2.

III. *Analysis and Rulings*

During the deposition the defendant raised a Fifth Amendment claim of privilege to each of the following questions where the Complainant has moved to compel an answer.

A. *Deposition questions to which Complainant's Motion to Compel is granted*

46–9[1] **About in April of '88, did you work as a field engineer for national Cash Register Company of the United States?**

46–21 **About April of '89, did you work as a dental technician for, I'll spell this, J-o-c-h-i-n Chrome Lab Company?**

47–1 **In about September of 1990, did you work for the GMA Research Company?**

47–6 **And in July of '91, did you work for the Bank of America Corporation as a customer representative?**

Prosecution of Respondent with respect to his work at these four companies is barred by the statute of limitations. As was noted above, the statute of limitations for non-capital offenses is five years

[1] The numerical references are the page and line, respectively, of the deposition transcript.

after the offense was committed, unless provided otherwise by law. 18 U.S.C. §3282 (1994). Even if Mr. Davila began his work with NCR in April of 1988, he would still be immune from prosecution because of the statute of limitations. Thus, with respect to this question, the Complainant's Motion to Compel is GRANTED.

49–6 **Sir, I'm showing you a document. Can you review that document, please. . . . Okay. Can you identify that document, please?** [Marked as Exhibit 2]

The document marked as Exhibit 2 purports to be the resume of Roberto Davila. The deposition question asks Respondent to identify and authenticate the document. He was not asked whether he submitted the resume to GTE as part of an application for employment. The resume does not list GTE as a current or former employer anywhere on the resume. There is no real danger that Mr. Davila would face criminal prosecution by identifying and/or authenticating resume. Thus, with respect to this question, Complainant's Motion to Compel is GRANTED.

B. *Deposition questions to which Complainant's Motion to Compel is denied*

48–18 **Okay. Sir, I'm showing you a document we've marked Exhibit One. I'd like for you to review that document, please. . . . That document is a copy. Can you identify what the document is a copy of?**

50–4 **Sir, I'm showing you an original of what purports to be a Social Security card. Can you identify that document?** [Marked as Exhibit 3]

50–18 **Exhibit 4. Sir, can you please review that document?**

50–25 **Exhibit 5. Sir, can you review that document please? It's a stapled document, four pages. Sir, can you identify that document?**

51–8 **Exhibit 6. Sir, I'm showing you an original document, Exhibit 6. . . . Can you identify that document?**

Requiring a witness to authenticate an incriminating personal document is subject to the Fifth Amendment privilege against self-incrimination. *See McIntyre's Mini Computer Sales Group v. Creative Synergy Corp.,* 115 F.R.D. 528 (D. Mass. 1987). The court in that case held that the privilege against self-incrimination protects a witness from producing incriminating personal records if such production would be testimonial in nature. *Id.* at 531. "The act of production will be considered testimonial if it compels [the witness] to admit that the documents exist, that they are in his possession or that they are authentic." *Id.* (citing *United States v. Doe*, 465 U.S. 605, 612–14 (1984)). Thus, since the privilege against self-incrimination extends to authenticating a document by the act of producing it, the privilege also extends to authenticating a document by other more direct means, such as declaring that a document is what it purports to be and identifying a signature on the document.[2]

With respect to the exhibits themselves, on its face deposition Exhibit 1 purports to be a copy of Mr. Davila's application for employment with GTE, which contains a social security number. Deposition Exhibit 3 purports to be a social security card with Mr. Davila's name, which is marked "not valid for employment." Deposition Exhibit 4 purports to be a written offer of employment from GTE to Mr. Davila dated December 16, 1992, and deposition Exhibit 5 purports to be letter from GTE (with attachments) to Mr. Davila dated January 20, 1993, confirming Mr. Davila's acceptance of a position as an associate in the GTE Engineering Associate Development Program. Finally, deposition Exhibit 6 purports to be the I–9 form and supporting documentation filled out and submitted by Mr. Davila upon his commencement of work with GTE. Complainant is seeking to have Respondent identify and authenticate these documents, which are highly incriminating. The answers to these questions could provide a link in the chain of evidence to prove that Mr. Davila applied for employment by GTE, that he was offered a job and was employed by GTE, and that he use a counterfeit social security card to satisfy the employment verification process. There is clearly a realistic link to a potential criminal prosecution for document fraud, and therefore Mr. Davila was entitled to

[2] I granted the motion to compel with respect to the question as to deposition Exhibit 2, which purports to be the resume of Mr. Davila, because the resume itself does not list GTE as an employer and does not link Mr. Davila to such employment. Therefore, I do not consider the request to identify Exhibit 2 as potentially incriminating. *See infra* at 5.

invoke his Fifth Amendment privilege against self-incrimination. Thus, with respect to the above five questions, Complainant's Motion to Compel is DENIED.

52–13 **Sir, have you applied for a Social Security card from the Social Security administration?**

52–19 **Sir, did you ever counterfeit your Social Security card?**

57–17 **Okay. Did you submit documents to GTE showing that you were authorized to work in the United States?**

59–4 **Okay. And did you submit that to GTE to show that you were authorized to work in the United States?**

59–9 **Did you ever submit a copy of your California driver's license to GTE?**

59–19 **Did you submit a copy of your Social Security card to GTE for purposes of work authorization?**

The answer to each of the questions could readily provide links in the chain of evidence in a criminal prosecution of Mr. Davila under 18 U.S.C. §1001 and 18 U.S.C. §911. Indeed, question 52–19 is a request for the Respondent to admit he violated the law. As was noted above, the Fifth Amendment's privilege against self-incrimination is properly invoked where a witness has "reasonable cause" to apprehend a danger of prosecution from an unprotected answer. *Hoffman*, 341 U.S. at 486–87. It would be reasonable for Mr. Davila to assume that answers to each of the above questions could provide a "link" or "nexus" towards his eventual criminal prosecution for document fraud, assuming the answers to the questions were of an incriminatory nature.. Therefore, the Complainant's Motion to Compel is DENIED with respect to the above five questions.

47–22 **Sir, did—did you apply for a job at GTE Corporation?**

59–25 **Sir, were you employed at GTE?**

61–4 **Sir, were you arrested by the immigration service in September of '95 while you were working at GTE?**

Neither party has addressed the issue of whether the mere fact that an unauthorized alien attempts to work, and is working, exposes the *alien* to criminal liability. Respondent has not suggested such a potential avenue of prosecution. However, since the crux of the Complainant's charge against the Respondent is that Mr. Davila altered or otherwise counterfeited a Social Security card for the purposes of obtaining work, the fact that Mr. Davila was working for GTE might constitute a link in the chain of evidence needed to prosecute Mr. Davila. I also note that there are numerous alternative ways the Complainant may seek to prove that the Respondent was employed by GTE without using the testimony of the Respondent to do so. Thus, with respect to questions 47–22 and 59–25, Complainant's Motion to Compel is DENIED. With respect to question 61–4, the Complainant's Motion to Compel is DENIED as well, for much of the same reasoning as question 59–25. Furthermore, Complainant may likewise prove the circumstances of Mr. Davila's arrest by means other than Mr. Davila's incriminating statements.

ROBERT L. BARTON, JR.
Administrative Law Judge